REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 36 OF 2016

(ROBBERY WITH VIOLENCE)

(CORAM: J.A. MAKAU – J.)

KEVIN OMONDI OYARE..…….…….....……APPELLANT

VS

REPUBLIC……..…….....…….....…..…RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 11.4.2016 in Criminal Case No. 800 of 2015 in Bondo Law Court before Hon. M. Obiero-P.M.)

J U D G M E N T

1. The Appellant **KEVIN OMONDI OYARE** was charged with one count of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge are that on the 28th day of August 2015 at Ndori village, Rarieda Sub County within Siaya County, while armed with a dangerous weapon namely knife, robbed **MELIKZEDEK NYAKUMA** of computer monitor make: S/No.C2-06449H-T44441-8C5-3174, valued at Kshs. 8,500. After such time of robbery used actual violence against **MELIKZEDEK NYAKUMA.**

2. After full trial, the appellant was found guilty, convicted and sentenced to suffer death.

3. The conviction and sentence provoked this appeal. The appellant filed a petition of appeal setting out six (6) grounds of appeal being as follows: -

> ***i. That the Learned trial magistrate erred in law, fact and failed to appreciate that the prosecution case was not only insufficient but also unreliable, discredited, fabricated and thus lacked probative values to warrant a conviction.***
>
> ***ii. That the Learned trial magistrate misdirected himself in law and fact by overlooking the material factors in the instant case and thus putting much consideration into material factors to base a conviction which was unsuitable in the interest of justice.***
>
> ***iii. That the Learned trial magistrate erred in law, fact and failed to consider that the purpose of criminal prosecution is not to obtain conviction but it is to lay before the court what the court considers being credible evidence relevant to what is alleged to be a crime by providing all available proof of the fact presented.***
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> ***iv. That the Learned trial magistrate erred in law, fact and relied on recognition of a single***

witness without examining carefully the material discrepancies between my description and the report given to the police.

v. That the Learned trial magistrate misdirected himself and relied with recognition without names of attackers of which close relatives and friends have been made errors sometimes.

vi. That the Learned magistrates erred in law and fact and ignored the appellant's alibi defence and erroneously shifted the burden of proving to the accused person and he forget that the accused who pleads an alibi assumes no burden to prove it.

4. Mr. Wakla, Learned Advocate appeared for the appellant whereas M/S Odumba, Learned State Counsel appeared for the state.

5. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISAAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)"

6. The facts of the prosecution's case form part of the record of appeal and I need not reproduced the same, however, I shall summarize the prosecution case and the defence.

7. The prosecution case is as follows: that on 28/8/2015, PW1, Melkezedek Nyakuna was at his house at around 5.00pm when he heard someone knocking the door, he entered and PW1 gave him some water to drink. The person told PW1 that his father had sent him to come and repair the Television. PW1 told him to call his father to which he told PW1he did not have credit giving PW1 Kshs. 10/= for airtime. PW1 sent Rose who refused prompting the appellant to go away. He then returned with a rope, tied Rose on her hands. He strangled PW1 as he was removing a knife from his pocket; threatening to stab PW1 with the knife. That he took the TV and went away with it. PW1 then proceeded to Ndori and informed his father PW2, John Wasonga Nyakuna with whom they returned to the home, found Rose still tied. PW1 and PW2 went to the police at around 7.00pm, made a report, recorded their statements and the following day they went to the accused's home, found him and he was arrested. Nothing was recovered from the appellant. That the accused later led 48932PC Samson Katana to his grandfather's home and then to a bathroom, from where the computer screen was recovered which was identified by the witnesses. The computer monitor make: *Dell* was produced as exhibit 2. The accused was subsequently arrested and charged with this offence.

8. The appellant on being put on his defence, he gave a sworn defence of alibi, stating that on 28th day of August 2015 at around 1700hours, he was at his home. That on 29th day of August 2015 at 7.00am, police came to his house, arrested him and he was later charged with this offence which he denied.

9. Mr. Wakla for the appellant combined grounds numbers 1 to 5 of the appeal to one ground based on the weighty and credibility of the evidence and urged ground no. 6 on its own.

10. M/S Odumba, Learned State Counsel concedes the appeal on the ground that the ownership of the TV set was not proved and on the ground of non-identification of the appellant.

11. Whether the evidence adduced by the prosecution was weighty and credible to sustain a conviction of robbery with violence? The evidence placing the appellant at the scene of incident is that of PW1 and PW2. PW2 being a minor, her evidence required corroboration and in absence of corroboration the only evidence placing the accused at the scene of robbery is that of PW1. PW1 in his evidence in chief, he averred that he knew the appellant prior to the incident and gave his name as Kevin urging that he did not know his home. PW2, a minor aged 12 years who was with PW1 stated she saw the appellant for the first time on the material date of robbery. That though PW1 claimed he knew the appellant very well and even by his name, he never when he went to report to PW2, told him that Kevin had robbed them. PW1 never in his evidence in chief stated what he informed his father PW2 as regards the robbery. PW2 in his evidence stated his son PW1 told him that somebody entered into the house and told him he had been sent by PW2 to repair the TV and that person tied one of PW2's children with a rope and took the TV. According to PW2, it was the members of public who told him the name of the person and his home. He was given the name of the person as Jaleka.

12. A critical issue for my consideration is whether PW1 recognized the appellant. Is there evidence laid on record to prove positive recognition of the appellant by PW1? In Wamunga V Republic (1989) KLR 414, it was stated that where the only evidence against the defendant is evidence of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of recognition were favourable and free from possibility of error before it can safely make it the basis of conviction. On the other hand, in **Simiyu & Another V Republic(2005) 1 KLR 192**, it was held that there is no better mode of identification than by name and when a name is not given then there is a challenge as the quality of identification and a great danger on mistaken identity arises.

13. PW1 in his evidence, he stated he knew the appellant very well and even by name. The offence occurred during daytime yet PW1 did not give the name of the appellant who he claimed he knew very well to his father PW2, but told him the TV was taken away by somebody. That if the person who PW1 saw and witnessed him rob him, the TV and he knew him as Kevin. *What was the difficulty in telling PW2 and the police officer, PW4 that he knew the assailant as Kevin?* The impression created by PW1 conduct is that the person who he saw during the broad daylight robbery and who robbed him was a stranger and not the Kevin he knew. Further, the impression he created is that he even did not know Kevin before, for if he knew him before, he could not have hesitated to say so to his father and the police at the earliest opportunity. The impression given is that when he stated before the trial court that the person who robbed him during the time of giving evidence was Kevin is that he was not telling the court the truth and probably he either heard of the name of the appellant when he was arrested and charged with the offence.

14. I have examined the evidence of PW1, PW2, PW3 and PW4 very carefully and I find the circumstances of recognition of the robber, though the offence occurred during daytime, are surrounded with a lot of doubts as there is no better way of identification of a person than by the name and description of one's occupation or home whether specifically or generally and where a witnesses claims to know someone by his name and fails to give the name at the earliest opportunity to either people who come to his aid or to whom he reports or meets immediately after the incident, there is a challenge on the quality of identification and a great danger of mistaken identity arises. Such evidence in my view should not be given a lot of weight as its credibility is very low.

15. In **Republic V Alexander Mutwiri Rutere Alias Sanda & Others [2006]eKLR**, the Court of Appeal stated that if a witnesses is known to the accused but no name is given to the police, then giving the name subsequently is either an afterthought or the evidence is not reliable.

16. In the instant case, I note PW1 who claimed to know the appellant prior to the incident by his name of

Kevin and also very well, never gave his name to his father (PW2) or to the police but gave the name at the time of giving his evidence before trial court. *The question is, what do we make of this evidence?* I find his evidence is either an afterthought or is a lie and as such not reliable and should have been declared incredible evidence. PW1 never in his evidence gave description of the robber; neither did PW2 state he was given the name of Kevin by members of public but one of Jaleka. No single witness from the members of public was called to connect Jaleka with the Kevin and no member of public stated why they connected Jaleka, if the same person is Kevin, with the offence. PW4 did not state he was given the name of Kevin as the assailant nor did he state that in the Occurrence Book, the complainant stated he was robbed and attacked by a person known to him. PW1 and PW2 in their testimony before the trial court claimed to have recognized and identified the appellant but in their initial report to the police or in their statement, none gave the name or description of the robber or even said the robber was a person who they knew his home or his place of work. ***(See Charles Gitonga V Republic [2006[eKLR)***.

17. In case of **George Bundi M'Rimberi V Republic, Criminal Appeal 352 of 2006**, Court of Appeal stated that a serious aspect arises when a witnesses fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is therefore my finding that PW1's failure to give a description of the appellant or mention his name or state that they were attacked by a person known to him weakens his testimony. The appellant being a person known to PW1, he should have given the name or the description of the appellant as stated in **Moses Munyua Mucheru V Republic, Criminal Appeal No. 63 of 1987**.

18. I find that in the instant case, the trial court failed to interrogate the evidence of PW1, PW2, PW3 and PW4 as it is in my view not enough for the court to state as the offence was committed in the broad daylight, that evidence was sufficient as regards recognition. The complainant should have given the name of the attacker if he is known to him at the earliest opportunity to the police and people who came to his aid. Description should equally be given in the first report but not only at the time of trial.

19. Mr. Wakla urged that the evidence as to who stole the TV set was insufficient to convict the appellant with the theft of the TV. PW4 in his evidence, stated that the appellant led them to the recovery of the TV from the bathroom of the appellant's grandfather, yet no witnesses was called to state the relationship between the appellant and the owner of the home from where the TV was recovered. PW4 stated he recovered the computer screen which he also referred to as computer monitor. The charge sheet talks of computer monitor. PW1, PW2 and PW3 talked of TV set and not computer monitor but that difference notwithstanding, the recovered computer monitor by PW4 was not proved to be the property of the complainant. PW1 did not produce a certificate of ownership nor a receipt to prove ownership of the recovered computer monitor belonged to him.

20. In **Raphael Isolo Echakara & Another V. Republic CRA No. 44 of 2013[2014] eKLR** the court of appeal stated:

> ***"On the allegation that the first appellant led the senior sergeant Benson to the recovery of a jacket which was tainted with human blood, the law is now well settled that as Section 31 of the Evidence Act Chapter 80 Laws of Kenya was repealed, the court can no longer act on the evidence related to items recovered as a result of a confession extracted from an accused person. In this case Senior Sergeant Benson could not take an inquiry statement or even charge and caution statement from the first appellant because he was below the rank allowed to do so even before the entire repeal of these provisions. Court could not in law act on the evidence obtained as related to what was recovered through such evidence. What happened here was not in law proper. The evidence leading to the recovery of the alleged jacket was not admissible in law and evidence obtained through such a confession was not admissible. Further it was alleged that it had slight blood stains of a human being. That blood was compared to blood samples allegedly obtained from the first appellant. First appellant denied having given his blood to anybody or that anybody took his blood. The prosecution said through Senior Sergeant Benson that."***

21. In the instant case, No. 48932 PC Samson Katana, Corporal of Police attached to Ndori Patrol Base, who arrested the appellant, claimed the appellant led him to his grandfather's home from where he

recovered the computer monitor from a bathroom. In that compound, there were occupants of the home of the purported appellant's grandfather's home and yet none was called as a witness. The computer monitor which was produced as exhibit 2; was recovered as a result of PW4 having interrogated the appellant, who he stated led him to the recovery of the computer monitor. That by virtue of **Section 31 of the Evidence Act, Cap 80 Laws of Kenya** having been repealed, the trial court erred on relying on that evidence relating to the item recovered as a result of a confession extracted from an accused person, as in this case the corporal of police could not take an inquiry statement or confession from the appellant because he is below the rank allowed to do so. That even before the section was repealed, he could not do so, and therefore the court could not in law act on the evidence obtained related to what was received through unlawful means. What the corporal did in this matter was contrary to the law and evidence obtained under such circumstances is admissible. ***(See* Raphael Isolo Echakara & Others V R (Supra)**.

22. Whether offence was proved? Mr. Wakla contends that it is alleged the appellant was armed with a knife and caused actual bodily harm to PW1 and PW2. PW1 in his evidence identified a knife before court. He did not explain how the knife found its way to the court nor had he prior to the recovery of the knife given description of the knife to PW4, the Investigating Officer. PW2 in his evidence did not state PW1 told him the person who attacked him had a knife. PW1 admitted that from the appellant's home they recovered nothing. Similarly PW4 stated nothing was recovered from the appellant. The knife identified by PW1 was not produced by PW4 as exhibit. I find that the robber was armed at the time of attack. There is evidence the robber was armed as PW2 also saw the knife, however, the robber was not recognized or identified as I have already found. I find there is no evidence that the knife was recovered from the appellant as none of the prosecution witnesses mentioned of any knife being recovered from the appellant.

23. Whether appellant's defence of alibi was considered? The appellant's defence is that at the time of robbery, he was at his house. The trial court considered the appellant's defence but brushed it aside. In view of the purported identification of the appellant by PW1 and PW3, the prosecution ought to have called sufficient evidence to dislodge the appellant's defence of alibi which I have found they did not for failure to have given in their first report, the name and the description of the appellant who PW1 purportedly knew very well by name. PW1 did not give the name of the appellant to PW2, his father nor PW4, the Investigating Officer. The Occurrence Book was not produced to show that PW1 gave the name of the appellant as the robber nor did PW3 give the description of the appellant. I find such evidence resulted to the Prosecution's failure to place the appellant at the scene of the crime and as the person who robbed PW1 and tied PW3 with a rope. Indeed such failure is so glaring, that a tribunal applying its mind properly would find that PW1 did not recognize his assailant, as when he immediately after robbery proceeded to inform his father, (PW2) he told him somebody had entered the house and taken the TV. PW2 stated as follows: -

> ***"My son by the name Melkezedek came. He told me that somebody had entered into the house and told him that I had sent him to repair TV. He told me that the person tied one of my children with a rope and took the TV. We went back home with him."***

I therefore find the trial court's failure to consider the appellant's defence prejudiced him and the trial court came to the wrong conclusion.

24. The Learned State Counsel concedes the appeal. I have considered the grounds of appeal and submissions by the Appellant's Counsel and I have found that the Learned State Counsel correctly concedes the appeal as the conviction cannot stand, the test of proof beyond any reasonable doubt.

25. The upshot is that the appeal is allowed. The conviction is quashed and sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 30TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Mr. Wakla: for Appellant

M/S Odumba: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE